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OFFICE OF PETITIONS

In re Application of :
Buck et al. :
Application Number: 10/590879 : ON PETITION
Filing Date: 08/27/2006 :
Attorney Docket Number: 060740-US :

This is a decision on the petition to withdraw the holding of abandonment filed on March 26, 2009.

The petition is **DISMISSED**.

This application became abandoned on January 24, 2009, for failure to timely submit the issue and publication fees in response to the Notice of Allowance and Fee(s) Due mailed on October 23, 2008, which set a three (3) month statutory period for reply. Notice of Abandonment was mailed on February 18, 2009.

Petitioner's counsel states that the Notice of Allowance and Fee(s) Due was not received from the USPTO until March 5, 2009, after the mailing of the Notice of Abandonment.

A review of the record indicates no irregularity in the mailing of the Notice mailed on October 23, 2008, and in the absence of any irregularity in the mailing, there is a strong presumption that the Notice was properly mailed to the address of record. This presumption may be overcome by a showing that the Notice was not in fact received.

MPEP 711.03(c) states:

> In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of

abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

> The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).
>
> (emphasis added)

At the outset, the registered patent practitioner must state that the Notice mailed on October 23, 2008 was not timely received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Notice was not timely received. A copy of the record(s) used by the practitioner where the non-received Notice would have been entered had it been timely received is required.

Further, a copy of the practitioner's record(s) required to show non-receipt (or, under the circumstances, delayed receipt) of the Notice should include the master docket for the firm. That is, if a three (3) month period for reply was set in the nonreceived Notice action, a copy of the master docket report showing all replies docketed for a date three (3) months from the mail date of the nonreceived Notice must be submitted as documentary proof of nonreceipt of the Notice. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

The petition is **DISMISSED.**

Alternatively, petitioner may wish to consider filing a petition to revive under 37 C.F.R. 1.137(b).

Any request for reconsideration must be filed within **TWO (2) MONTHS** of the date of this decision. **This time period may not be extended.**[1]

Further correspondence with respect to this matter should be addressed as follows:

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[1] 37 CFR 1.181(f).

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Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3231.

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